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Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

SANDRA MOTELES,

Petitioner

v.

UNIVERSITY OF PENNSYLVANIA

and

LOCAL 506, UNITED PLANT GUARD WORKERS OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Sandra Moteles, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 15, 1984,

and amended on April 25, 1984 which was followed by a denial of a petition for rehearing and rehearing in banc with two Judges dissenting and four Judges not participating on April 25, 1984.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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1. May an employer and union defend a Title VII sex discrimination case where they change a contract to result in separate and unequal seniority for women, remove a qualified woman from a gender neutral job that would be hers by seniority if she were a man, and force her into a less desirable "woman's" position, claiming bona fide occupational qualification as a defense?

2. Is irreparable injury beyond intentional discrimination a prerequisite for a private plaintiff to obtain a preliminary injunction under Title VII, and, if so, may a reviewing court reverse a finding of irreparable harm, and must a union member be barred from such relief

because she might claim compensatory damages in an action for breach of her contract and violation of the duty of fair representation?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The caption of the case contains the names of all parties to the proceeding in the Court of Appeals.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 15, 1984. Orders amending the opinion and denying a timely petition for rehearing were entered on April 25, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)(1976).

STATUTORY PROVISIONS

United States Statutes:

42 U.S.C. §2000e-2 (§703 of the Civil Rights Act of 1964 as amended in 1972):

(e) Religion, sex, or national origin as bona fide occupational qualification; educational institutions with employees of particular religions. Notwithstanding any other provision of this title [42 USCS §§2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or

other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ...

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title [42 USCS §§2000e et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an

intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§2000e et seq.], for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)) [29 USCS §206(d)].

42 USCS §2000e-5(f)(2) (§706 of the Civil Rights Act of 1964 as amended in 1972):

(f) Civil action by Commission, Attorney General, or person aggrieved.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for

hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement, or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a

charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement or an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS §2000e-3(a)].

29 C.F.R. Part 1604, Guidelines on Discrimination Because of Sex.

§1604.3 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male", or for a job in a "male" line of progression and vice versa ...

(b) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex

into jobs which members of that sex would reasonably be expected to perform.

STATEMENT OF THE CASE

Introduction - Counterfeit BFOQ

This case arose when petitioner Sandra Moteles, a campus patrol officer, was reassigned to the night shift in violation of her contract seniority rights because the respondent wanted a woman working at night. Moteles was undisputedly qualified to work her gender-neutral day shift position, and she had undisputedly earned her place on that shift through the exercise of her contract seniority rights. Respondent claimed, however, that there was a woman's position on the night shift that none of the male officers could handle. Asserting a counterfeit BFOQ defense, respondent argued that its need for a woman on the night shift could justify discriminating against

Moteles on the day shift, and it forced Moteles to work the woman's job, against both her will and her contract. This lawsuit ensued.

The District Court issued a preliminary injunction after a hearing in which it found irreparable harm to the plaintiff, no harm to defendant, and intentional sex discrimination to which respondents' claimed defense under Title VII's BFOQ exception was irrelevant. The District Court reasoned that BFOQ could be used to keep the unqualified out of a job, but not to lock the qualified into one in violation of her rights elsewhere in the workplace.

The Third Circuit vacated the injunction and remanded the case, holding without precedent that the counterfeit BFOQ defense was assertable to justify the removal of a qualified woman from a gender-neutral job

to the less desirable "woman's position." It viewed Officer Moteles' seniority right to the neutral job as a matter only for arbitration, and irrelevant to Title VII. It held that Moteles could not have suffered irreparable harm because her injuries could be compensated in an action at law based on her union contract.

Officer Moteles' petition for rehearing in banc to the Third Circuit was denied without participation of four members of the Court. Judge Becker and Judge Gibbons dissented, pointing out the counterfeit nature of respondents' BFOQ defense by commenting that an employer may assert BFOQ to reserve a job for a woman, but not to reserve a woman for a job. This is the issue presented in this petition for certiorari.

Factual Statement

Sandra Moteles has served as a patrol officer in the Department of Public Safety of the University of Pennsylvania since 1977. Throughout, she has been a member of Local 506, United Plant Guard Workers of America, and has been covered by a union contract. The patrol division covers three shifts -- day, evening, and night -- and in 1983, included roughly thirty-seven males and four females, all of whom were members of Local 506. Until 1983, their contract entitled them to bid on the shift of their choice by seniority. In addition, the University employed six sergeants, of whom two were women, four detectives, of whom two were women, and a female security specialist. The sergeants, detectives, and security specialist were not members of the bargaining unit. (App. 13a-14a).

In 1979, Moteles asserted her contract seniority right to bid successfully on the day shift. Sixteen junior male officers did so subsequently, and took places below Moteles on the day shift seniority list. (App. 14a).

Since 1973, the University has had a policy of having a woman officer available on each shift. Until 1982, however, the policy had no effect on the patrol officers' seniority, and the contract assured all patrol officers the right to bid on shifts by seniority, without reference to the 1973 policy. However, in May of 1982, the respondent instituted a one-woman-per-shift quota on the officers in the patrol division, and agreed with the union in December of 1982 (the "DuPlantis Agreement") that given the shortage of female officers, if the womens' seniority rights impeded the implementation

of the rule, seniority rights would give way. Officer Moteles grieved the "DuPlantis Agreement" in December of 1982. Shortly thereafter, she was forcibly reassigned pursuant to the rule, and she filed two additional grievances. The University and the union both opposed Officer Moteles' claims in the grievance procedure, and she was unable to block the adverse personnel action. (App. 16a-17a).

The University's history of hiring women officers is as follows: from 1978 through 1982, twenty-four women applicants were eligible to be hired as patrol officers; five of them were actually hired.

On February 15, 1983, Officer Moteles filed a charge of sex discrimination with the EEOC. The charge was deferred to the state agency and returned to EEOC for processing on March 16, 1983. Upon request by

Officer Moteles and a finding that the charge could not be resolved within 180 days, the EEOC issued a right-to-sue letter, upon which Moteles filed suit. (App. 17a).

The Preliminary Injunction

The District Court held two days of hearings on Officer Moteles' motion for preliminary injunction. Moteles challenged respondents' actions on the ground that she had been discriminated against on the day shift by being stripped of her seniority right to that job. She argued that regardless of whether the University needed a woman at night or not, it could not justify sex discrimination elsewhere in the workforce in order to fill that need.

The District Court agreed with Moteles and held that the University and the union had unlawfully taken Moteles' seniority

rights in signing the "DuPlantis Agreement," and that the BFOQ defense was irrelevant to Moteles' claim. (App. 3a-10a).

Regarding Moteles' request for a preliminary injunction, the Court heard evidence that as a result of her forced transfer, Officer Moteles suffered loss of sleep and severe disruption of her emotional life. In addition, the reassignment interfered with her education in that she was forced to miss classes in a Spanish course she was taking which was mandatory for her undergraduate degree. She was told on March 21st by a superior officer that she was denied permission to take time off to attend her classes, which she knew had been granted to other officers, "because of litigation." (App. 24a).

The District Court issued a preliminary injunction directing the University to re-

assign Officer Moteles to the day shift and directing the union to accede. It held that the defendants had violated Officer Moteles' seniority rights and that the bona fide occupational qualification defense could not be used to lock a qualified individual into a position, especially in violation of seniority rights. (App. 1a-2a).

The District Court also found that Officer Moteles' "injury is of a peculiar nature so that compensation and money cannot atone for it ... [it] is substantial and irreparable. Plaintiff is suffering injuries caused by retaliation visited upon her by University authorities while she was being asked to be the sole member of the University community to bear the brunt of the rule." (App. 11a-13a).

Appeal to the Third Circuit

A panel of the Third Circuit reversed

the grant of the preliminary injunction, holding that nothing in Title VII prevented the use of BFOQ to justify requiring an individual to work a job because of her sex, and that the violation of Officer Moteles' seniority rights posed a contractual dispute irrelevant to resolution of the Title VII claim, to be determined by arbitration, not the Court. In addition, it held impliedly that the District Court's finding of irreparable injury for preliminary injunctive relief under Title VII was clearly erroneous based on a review of the record. It reversed the irreparable injury finding and characterized plaintiff's injuries as "inconvenience easily compensable by damages," apparently relying on Officer Moteles' separate cause of action under 29 U.S.C. §185 for breach of contract and the violation of the duty of fair representation. (App. 14a-29a, as amended at 35a-36a).

On a petition for rehearing in banc, four of the eleven active members of the Court of Appeals recused themselves, and the petition was denied. Circuit Judges Becker and Gibbons, who were not on the panel, dissented on the ground that the decision was "inconsistent with the tenor of [the Third Circuit's] prior pronouncements and those of the Supreme Court on Title VII, particularly on the seniority area." In addition, those Judges viewed this case as "of considerable importance [,]" because "as the Federal Courts work their way through the 'second generation' Title VII cases, i.e., those dealing not with mass discrimination but with the more technical aspects of the law, the BFOQ exception and the notion of business necessity will become increasingly important." Those Judges urged in banc consideration "so that the contours of these doctrines might be more fully and

definitively explored." (App. 30a-34a).

They expressed their concern that BFOQ was being used to grant full job security for men in gender-neutral jobs but to deny such seniority to women. They pointed out that although the defense may permit an employer to reserve a job for a woman, Title VII as a whole will not permit the employer to reserve a woman for the job. (Ibid.)

REASONS FOR GRANTING THE WRIT

I. SENIORITY AND BONA FIDE OCCUPATIONAL QUALIFICATION:

THE APPEALED DECISION USES BFOQ TO CREATE MALE AND FEMALE JOB CATEGORIES FROM WHICH THE QUALIFIED CANNOT ESCAPE EVEN THROUGH SENIORITY

A. The Decision Below Conflicts With This Court's Holdings That Title VII Protects Innocent Employees From Burdens On Their Seniority Rights, Even For Beneficial Motives

In Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767 (1984), this Court has restated its firm commitment to the protection of employees' bona fide seniority rights from attacks by employers which seek to sacrifice them for the benefit of those with competing interests. Following the lead of Franks v. Bowman Transportation Co., 424 U.S. 947 (1976) and Teamsters v. United States, 431 U.S. 324 (1977), the Stotts decision once again acknowledges the paramount

importance of seniority rights to the employee, and assures that those rights will not be subordinated to any claims except those of identifiable discriminatees.

This Court has protected §703(h) [1] seniority rights not only when the rights of innocent union members are pitted against the rights of discriminatees to be made whole, but also where the tension is between the seniority rights of the protected class and the employer's choice of management measures, as in the instant case. In Satty v. Nashville Gas Co., 434 U.S. 136 (1977) this Court declared that a gender-based personnel action which is otherwise allowed under Title VII will not be permitted to burden female employees, but not males, with loss of seniority and employment opportunities,

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1. §703(h) of Title VII is set forth fully at pp. 3-4, ante.

434 U.S. at 142 (explaining why pregnancy-based discrimination, held permissible in the context of disability benefits under Gilbert v. General Electric Co., 429 U.S. 125 (1976), violates Title VII when it burdens female employees' seniority vis-a-vis males). Even where it is women's unique ability to bear a child that forms the basis for the employer's disparate treatment, as is the case when a BFOQ argument is raised, women's seniority cannot be forfeited in favor of management prerogative. Ibid.

In this case, by contrast, the Third Circuit has relegated seniority rights to a secondary position, implying that the only forum for Officer Moteles' claim that she has been stripped of her seniority rights by virtue of her sex is the arbitral one. In so deciding, the panel ignores the tremendous respect which the Civil Rights Act promises for what Moteles has earned

as a union member, and it defies the teaching of Satty that disparate treatment with respect to seniority will not be tolerated under the statute.

B. The Unprecedented Expansion of the BFOQ Defense to Permit Discrimination Beyond the Instance of the BFOQ Position Contradicts This Court's Explicit Requirement of Narrow Construction, Flies in the Face of EEOC Regulations, and Conflicts with Decisions of the Fourth and Eleventh Circuits

Title VII's prohibition against discrimination must be construed in light of the important national policy against discrimination, and in light of the broad, remedial purpose of the statute. Aikens v. U.S. Postal Service Board of Governors, 103 S. Ct. 1478 (1983). The BFOQ provision, by contrast was:

> "... meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."

Dothard v. Rawlinson, 433 U.S. 321 (1977).

In direct contradiction to this requirement that Title VII's BFOQ provision be narrowly construed, the Third Circuit in this case has expanded the exception to invite discrimination beyond "those certain instances" where sex is reasonably necessary to perform the job.[1] It has permitted discrimination in the non-BFOQ position to acquir a female to fill a BFOQ vacancy. The Dothard principle, by contrast, would prohibit such an expansive construction.

EEOC's regulations present a different approach to the same conclusions that BFOQ cannot be used to prevent a woman from bidding off of a female job she does not wish to perform. At 29 C.F.R. §1604.3(a)(1), (pp. 7-9, ante), the Commission specifically

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1. 42 U.S.C. §2000e-2(e), set forth in full at pp. 2-3, ante.

declares unlawful a system which prohibits a woman from applying to go from one line of progression to another -- exactly the prohibition that respondents have imposed here -- unless the applicant's chosen destination can only be performed by a man -- which respondents do not claim. There is no permission given in the regulation for an employer to drag its net throughout its workforce for women to perform women's work, as the Third Circuit decision implies. If the EEOC regulation is to be given great weight,[1] then the panel opinion must be reversed.

The appealed decision also conflicts with the law of the Fourth and Eleventh Circuits. In Wright v. Olin Corp., 697 F.2d 1192, f.n. 21, the Fourth Circuit reiterates the principle of narrow construction

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1. Moody v. Albemarle, 422 U.S. 405 (1975).

and holds that the BFOQ defense can be raised only against the unqualified employee. In Hayes v. Shelby Memorial Hospital, _____ F.2d_____, 34 F.E.P. Cases 444, 449 (1984), the Eleventh Circuit similarly applies the principle of narrow construction to prohibit the expansion of the BFOQ defense to encompass an employer's fetal protection policy.

The Third Circuit, by contrast, has taken the liberty of extending the BFOQ while cutting back on rights protected by Title VII, and for this reason, should be reversed.

II. PRELIMINARY INJUNCTION:

IN CONFLICT WITH DECISIONS OF THIS COURT, THE APPEALED DECISION PREVENTS UNION MEMBERS AND OTHER PLAINTIFFS WITH PARALLEL CLAIMS FOR COMPENSATORY DAMAGES FROM OBTAINING PRELIMINARY INJUNCTIVE RELIEF UNDER TITLE VII

Officer Moteles met the requirements of preliminary injunctive relief under Title VII. The District Court credited Officer Moteles' testimony and held that she suffered peculiar injuries which were irreparable. She testified to the emotional distress caused by the substantial and unpredictable disruption of her life schedule as well as the interference with her education occasioned by the forced transfer to the night shift. The Third Circuit, however, characterized this abrogation of the seniority rights Officer Moteles had earned to schedule and predict her working hours and pursue her education as "inconvenience easily compensable by damages."

When it held that Officer Moteles' injuries were not irreparable because they were compensable, citing breach of the duty of fair representation cases, the Third Circuit ignored explicit holdings of this Court which preserve Title VII as a separate and independent remedy from other causes of action. In three successive years in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), Johnson v. R.E.A., 421 U.S. 454 (1975), and Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), this Court has reiterated the independence of Title VII remedies from those available under 42 U.S.C. §1981 and the system of resolving labor disputes.

The Third Circuit, by contrast, has now made the availability of the Title VII remedy explicitly dependent upon the absence of any parallel claims under 42 U.S.C. §1981, 29 U.S.C. §185, or common law claims for damages.

Furthermore, in reversing the District Court on its finding of the ultimate fact of irreparable harm, the Third Circuit ignored this Court's teaching that the job of fact-finding and weighing of equities is for the trial court, not the Court of Appeals. Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982); DeMarco v. United States, 415 U.S. 449, 450 n. (1974); Trout v. Lehman, _____ U.S._____, 34 F.E.P. Cases 76 (1984). This arrogation of the District Court authority by the Court of Appeals should be reversed as inconsistent with higher authority.

III. PRELIMINARY INJUNCTION:

THE HOLDING THAT A PRIVATE PLAINTIFF WITH A RIGHT-TO-SUE LETTER MUST SHOW IRREPARABLE INJURY BEYOND INTENTIONAL SEX DISCRIMINATION PRESENTS A CONFLICT WITH THE FIFTH CIRCUIT

This case presents an opportunity for this Court to clarify the standard of proof

necessary for a private plaintiff to obtain preliminary injunctive relief under §706(g) of Title VII, 42 U.S.C. §2000e-5(g). (pp. 6-7, ante).

The position adopted by the Third Circuit that a showing of irreparable injury is a necessary prerequisite for injunctive relief under Title VII, relying on EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981) is based on a section of Title VII not applicable to this case [1] and conflicts with a line of cases from the Fifth Circuit most recently expressed in Middleton-Keirn v. Stone, 655 F.2d 609 (5th Cir. 1981). Other Circuits adopt substantially different standards.

Officer Moteles relies on §706(g) of Title VII, 42 U.S.C. §2000e-5(g), for the

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1. 42 U.S.C. §2000e-5(f)(2), set forth in full at pp. 5-6, ante.

authority of the District Court to grant her preliminary injunctive relief. As this Court recently noted in Firefighters Local Union No. 1784 v. Stotts, 52 U.S.L.W. 4767, 4772 n. 15 (1984), Congress intended to give courts wide discretion to make identifiable victims of unlawful discrimination whole when it amended §706(g) in 1972 to add "any other equitable relief." 118 Cong. Rec. 7168 (1972), Franks v. Bowman Transportation Co., 424 U.S. 947, 764 (1976). The Fifth Circuit has consistently held that irreparable injury is presumed where a plaintiff who has exhausted administrative procedures has satisfied the Court of a violation of statutory rights, in this case intentional sex discrimination, because such discrimination is against the public interest.

The Fifth Circuit's analysis is consistent with this Court's in Sampson v. Murray, 415 U.S. 51 (1974) which required a showing

of irreparable injury to avoid interference with administrative processes while an agency appeal was pending. Agency proceedings then closed in Officer Moteles' case when the right-to-sue letter issued.

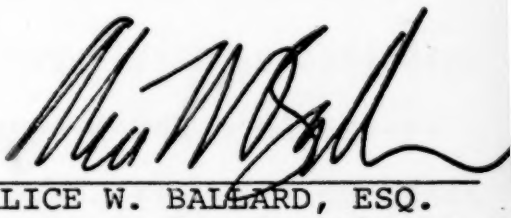
Other Circuits which have considered the issue of what a plaintiff must establish to obtain preliminary injunctive relief under Title VII maintain different standards which Officer Moteles met. The Second and Ninth Circuits provide for an alternative showing to obtain preliminary injunctive relief: "... either (i) probable success on the merits and possible irreparable injury, or, (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidely toward the party requesting the preliminary relief." Aquirre v. Chula Vista Sanitary Service, 542 F.2d 779, 781 (9th Cir. 1976); Gresham v. Chambers, 501 F.2d 687, 691 (2nd Cir. 1974). The Seventh

Circuit requires a showing of irreparable injury, Ekanem v. Health & Hospital Corp., 589 F.2d 316 (1978), while the Sixth Circuit requires the prospect of irreparable harm, Washington v. Walker, 529 F.2d 1062 (1976).

In §706(g), no distinction exists between the Court's power to grant equitable relief in a preliminary or a final injunction and no statutory language requires irreparable injury beyond intentional discrimination against a plaintiff's employment opportunities for the issuance of equitable relief. If the District Court finds a statutory violation and determines immediate equitable relief is appropriate in order to effectuate the fullest relief, a preliminary injunction is proper. Those requirements were met in this case and the injunction was erroneously vacated.

CONCLUSION

For the foregoing reasons, petitioner's Petition for Writ of Certiorari should be granted.



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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

SANDRA MOTELES,

Petitioner

v.

UNIVERSITY OF PENNSYLVANIA

and

LOCAL 506, UNITED PLANT GUARD WORKERS OF AMERICA,

Respondents

APPENDIX

Order, District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-1301

SANDRA MOTELES

v.

UNIVERSITY OF PENNSYLVANIA and LOCAL 506,
UNITED PLANT GUARD WORKERS OF AMERICA

ORDER

NOW, April 5, 1983, following hearing in open court on April 4, 1983, and upon consideration of plaintiff's motion for a preliminary injunction, memoranda submitted by the parties, the parties' stipulation that plaintiff need not file a bond and the entire record before me, and based upon the findings and conclusions made in

open court this date, IT IS ORDERED that:

1. Defendant University of Pennsylvania shall immediately reassign the plaintiff to the day shift in her employment as a uniformed police officer in the Campus Police;

2. Defendant Local 506 of the United Plant Guard Workers of America shall immediately accede in the aforementioned reassignment of the plaintiff, and shall cease, desist, and refrain from any activity which would derogate the plaintiff's right to choose her shift of preference according to her seniority.

Bond not required by agreement of the parties.

(s) Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-1301

SANDRA MOTELES

v.

UNIVERSITY OF PENNSYLVANIA and LOCAL 506,
UNITED PLANT GUARD WORKERS OF AMERICA

Bench Opinion

(All counsel and parties being present, the following transpired in open court:)

THE COURT: I have considered the memoranda submitted by the parties, the record as it now exists, and the arguments

of counsel, and I am now prepared to rule on the question of whether defendants can establish a "bona fide occupational qualification" defense to plaintiff's claim of intentional sex discrimination.

As a preliminary matter, I note that plaintiff and defendants agree that this case is best analyzed under a disparate treatment rationale and I agree with this conclusion. The settlement agreement between Local 506 and the University discriminates against plaintiff with respect to the terms, conditions and privileges of employment, in violation of Section 703(a)(1) and (2) and Section 703(c)(1) of Title Roman VII. 42 U.S.C. Section 2000e-2(a)(1) and (2) and (c)(1).

Local 506 contends that plaintiff's claim against the Union is based upon failure to properly grieve or dispute

against the University. This ignores the plain gist of this complaint which is, the DuPlantis Settlement Agreement, agreed to by the Union and the University, discriminates against her on the basis of sex. Thus, the availability of a BFOQ defense under Section 703(e) of Title Roman VII is a matter of concern for Local 506.

Defendants are correct in stating that the BFOQ defense applies in other than pure hiring situations. Thus, having the characteristics of a certain sex may be a BFOQ for a position within an employer's business such that a member of the opposite sex may be transferred out of that position or refused an opportunity to transfer into that position. See Backus vs. Baptist Medical Center, 510 F. Supp. 1191 (E.D. Ark. 1981). Vacated as moot, 671 F.2d 1100 (8th Cir. 1982);

Sutton vs. National Distilleries, 445 F. Supp. 1319 (S.D. Ohio), affirmed, 628 F.2d 936 (6th Cir. 1980).

However, these cases still do not apply to the instant situation and indeed, defendants cannot cite one case in which a BFOQ defense applied to facts similar to those before me. In all the cases cited by defendants, the BFOQ was used by an employer to exclude applicants or employees from a position because these applicants or employees were not of the sex necessary to fulfill the positions' requirements. In no case has the Court allowed an employer to place the burden on the group that fulfills the BFOQ requirement, such that they are locked into a position or, here, a shift when members of the opposite sex are able to rely on their seniority rights. Certainly, as

held by the Court in Brooks versus ACF Industries, Inc., 537 F. Supp. 1122 (S.D. W. Va. 1982), the seniority rights of an employee may be violated when, taken together with the privacy rights of others, the employer has no other reasonable option but to bar or exclude the employee from the position in the employer's business. However, defendants have not cited authority for the proposition that the seniority rights of an employee may be violated because she is one of the few members of the sex that meets the BFOQ that the employer has seen fit to hire or otherwise retain.

Moreover, Brooks is authority for a contrary result. In that case, the Court stated that the employee's seniority rights could not be violated for purposes of imposing a reasonable alternative to the imposition of a BFOQ requirement for the

position in question.

Thus, Brooks is the best authority for the proposition that the University here cannot violate plaintiff's seniority rights, rather than impose either a BFOQ on a new female position within the security force, if proper or some other reasonable alternative. I adopt the rationale of Brooks and find that the BFOQ defense is totally inapplicable to the facts as defendant presents them to be.

This result, of course, has support in the statute which allows an employee to use a BFOQ to "hire and employ" employees and a union to use a BFOQ to "classify" its members for purposes of employment.

Certainly, the word "employ" means more than merely "to hire". However, it is not so broad as to allow employers to impose BFOQ on all the terms, conditions, and

privileges of employment. It is reasonable to assume that an acting -- let me correct that. It is reasonable to assume that in enacting this section, Congress contemplated that certain businesses and even certain positions within a business demand that a member of only one sex can perform its functions. That is the obvious reading of the section. Therefore, Congress allowed employers and unions to impose BFOQ on those businesses or positions, such that members of other sexes could be excluded. By no reading of the statute can one reasonably conclude that Congress decided to vitiate the seniority rights of those who meet the BFOQ requirement and allow others to retain seniority rights.

The University maintains that plaintiff has only qualified seniority right in contrast to the Plaintiff in Brooks. Here, the collective bargaining agreement allows

seniority to be used in shift preference, "provided the employee involved is reasonably capable of performing the work in question." Thus, defendants contend that they can violate plaintiff's seniority rights or more particularly, that she has no rights to be violated on these facts, in transferring her shift as a reasonable alternative to imposing a BFOQ.

This contention is patently frivolous and it fails for the same reason that the BFOQ defense fails. There is no argument that plaintiff cannot perform adequately on the day shift, just as there is no merit to the position that a male guard is necessary on the day shift for BFOQ purposes. This contract provision, as with the BFOQ defense, is inapplicable.

For all these reasons, I conclude that the BFOQ defense is not available on the facts as defendants contend them to be.

In ruling on the motion for a preliminary injunction, I note that there is a factual record before me consisting of the stipulation of uncontested facts which was approved and admitted into evidence, all exhibits admitted into evidence, and the testimony taken in open court.

In addition, the plaintiff testified in open court. I find that she testified in a candid and straightforward manner, that her testimony was not impeached by the defendants and that she was a credible witness.

In ruling on a motion for preliminary injunction, I must consider whether the plaintiff has demonstrated a reasonable probability of success on the merits, the irreparable injury that plaintiff will incur without the requested relief, the harm to other parties, and the public interest. In re Arthur Teacher's

Franchise Litigation, 689 F.2d 1137 (3rd Cir. 1982).

I find that, given the unavailability of the BFOQ defense and the facts presented by defendants and the stipulation of facts, plaintiff has demonstrated a substantial likelihood of success on the merits. It is clear that the rule and the settlement agreement operate to treat plaintiff in a discriminatory manner because of her sex.

I also find that plaintiff will be irreparably injured by the continued operation of the University's rule. Her injury is of a peculiar nature so that compensation and money cannot atone for it.

Further, although I do not adopt the rationale that any clear violation of one's civil rights constitutes irreparable harm, see Middleton-Keirn versus Stone, 655 F.2d 609 (5th Cir. 1981) and cases cited therein,

I do find the injury in this case to be substantial and irreparable. Plaintiff is suffering injuries caused by retaliation visited upon her by University authorities while she is being asked to be the sole member of the University community to bear the brunt of the rule.

Further, I find no harm to the other parties or to the public interest.

This bench opinion constitutes my findings and conclusions under Rule 52, I shall issue a written order forthwith on granting a preliminary injunction under Rule 65 based upon the findings I have made in this bench opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1319

SANDRA MOTELES,

Appellee

v.

UNIVERSITY OF PENNSYLVANIA and
LOCAL 506, UNITED PLANT
GUARD WORKERS OF AMERICA,

Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-1301)

Argued January 24, 1984

Before: HUNTER and WEIS, *Circuit Judges*,
and DUMBAULD, *District Judge**

(Opinion filed March 15, 1984)

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* The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this Title VII case, the district court preliminarily enjoined the involuntary transfer of a female campus security officer to a less desirable shift.

The court reasoned that the plaintiff had more seniority than a number of male officers and ruled that the employer's defense of a bona fide occupational qualification was irrelevant. We vacate the preliminary injunction, concluding that the plaintiff failed to show irreparable injury and that the BFOQ proffer was a proper defense.

The plaintiff filed a discrimination complaint with the EEOC against her employer, the University of Pennsylvania. She was issued a right-to-sue letter and then brought this suit seeking injunctive relief and damages. The district court granted a preliminary injunction and the defendant University has appealed.

After several rapes on campus in 1973, female students staged a "sit-in" protesting the lack of adequate security. Following negotiations, the University pledged that the next guard hired would be a woman. It also agreed to create and staff an official position designated as Female Security Specialist to promote and oversee the development of a rape victim service program.

Students again protested in 1976 because they were dissatisfied with the University's progress in fulfilling the promises made in 1973. The provost appointed a committee to assess the problem and offer solutions. In early 1977, the committee recommended measures that included assigning at least two women on each work shift of the campus police so they would be available to female students when needed or when a sexual assault occurred. One woman was to be a security officer and the other a detective. The progress in hiring and retaining female officers was also reviewed, and it was urged that, despite budget cutbacks, the number of persons on the security force be increased.

Later that year, on October 10, 1977, plaintiff Moteles began working as a security guard for the

University. She was assigned to various shifts and by 1983 was working regularly on the day shift.

In 1982 two female security officers were transferred from the day shift (7:00 am -- 3:00 pm) to the evening (3:00 pm -- 11:00 pm) and night (11:00 pm -- 7:00 am) assignments so that each shift would have at least one woman officer. The women filed a grievance through Local 506, their collective bargaining agent. The union and the University settled the dispute. In what is called the "DuPlantis Settlement" they agreed that whenever the female-only position on a shift was vacant, the other women officers would be given the opportunity to bid on it. If no bids were received, the opening would be filled by a woman officer through inverse seniority.

In early 1983, the female officer assigned to the evening shift was promoted to sergeant, thus creating a need for a woman during that work period. When none of the officers bid on that position, plaintiff was transferred to that assignment effective March 14, 1983.

On February 15, 1983, before plaintiff was transferred, she filed a complaint with the EEOC alleging that the DuPlantis Settlement Agreement constituted discrimination. The complaint was referred to the Pennsylvania Human Relations Commission. At the plaintiff's request, the state commission waived jurisdiction and returned the matter to the EEOC on March 16, 1983. On that same day, the plaintiff's counsel requested the Commission to issue a right-to-sue letter. The agency did so on the following day, and plaintiff immediately filed suit in the district court.

Plaintiff began working the evening hours on March 20, 1983. However, by the time of the preliminary injunction hearing in the district court on

April 4, 1983, she had already successfully bid on an opening on the night shift. When plaintiff was transferred to the evening assignment, the University had forty-one security officers. Four were women, including one trainee who was to be commissioned on April 1, 1983. Of the force's six sergeants, two were women. In the detective division two of four persons were women.

At the time the transfers were made, the University had a collective bargaining agreement with Local 506, which represented all the security officers. Article XII, section 6 of the contract provided that seniority was to be used in "shift preference . . . provided the employee involved is reasonably capable of performing the work in question." At the time of her involuntary transfer, plaintiff had greater seniority than a number of the male security officers.

The district court ruled that it had jurisdiction to hear the case since the EEOC had issued plaintiff a right-to-sue letter and the agency's reasons for so doing were irrelevant. The court concluded that the University had violated the plaintiff's seniority rights and that the bona fide occupational qualification defense was "totally inapplicable to the facts as defendant presents them to be." A defense based on the contract language "reasonably capable of performing the work" was also found to be inapplicable.

As for the requisite irreparable injury, the court found that "[h]er injury is of a peculiar nature so that compensation and money cannot atone for it. . . . [It] is substantial and irreparable. Plaintiff is suffering injuries caused by retaliation visited upon her by University authorities while she is being asked to be the sole member of the University community to bear the brunt of the rule." The University was directed to immediately reassign plaintiff to the day shift and the

union was directed to accede in that assignment. A request for a stay pending appeal was denied.

On appeal, the University contends the district court lacked jurisdiction, plaintiff failed to present evidence of irreparable harm, and the court erroneously excluded evidence on the BFOQ.

I

We first address the jurisdictional question. The University contends that because the EEOC did not attempt informal resolution of the charge before issuing plaintiff a right-to-sue letter, she has not exhausted her administrative remedies. Therefore, the University argues, the suit was premature.

Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1) (1976), provides that in the absence of a conciliation agreement, the Commission shall notify an aggrieved party if the agency dismisses the charge or does not file a civil action within the requisite time. That period is 180 days from either the date of the charge or the expiration of the period of reference to a state agency. On receiving notice of a right to sue, the complainant has ninety days to bring suit in the district court.

Another provision of the Act requires the EEOC to notify the employer of the charge against it, to investigate the allegations, and to either dismiss or attempt to conciliate the complaint. 42 U.S.C. § 2000e-5(b). In the case at hand, none of these steps were taken, apparently because plaintiff thwarted any administrative activity so she could gain early resort to the district court.

As we noted in *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), "Conciliation rather than formal court proceedings remains the preferred method of

settling [discrimination] disputes." In establishing these procedures, Congress acted on the assumption that "[a]dministrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases." H.R. Rep. No. 238, 92d Cong., 2d Sess. 2 *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2146. Furthermore, "the sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditure of judicial resources in already heavily overburdened Federal district courts." *Id.*

Despite Congress' declared preference for agency resolution of complaints, the EEOC has adopted a regulation permitting an aggrieved party to request a right-to-sue letter at any time before the expiration of 180 days, calculated from the date the charge is filed. The only precondition to issuance of the letter is that a designated official certify that the Commission "will be unable to complete its administrative processing of the charge" within the statutorily specified time. 29 C.F.R. § 1601.28(a)(2) (1983).

In a thoughtful opinion, the district court in *Spencer v. Banco Real*, 87 F.R.D. 739 (S.D. N.Y. 1980), found that the regulation was inconsistent with Title VII and directed that the suit be suspended, rather than dismissed, until the plaintiff completed administrative procedures before the EEOC. Other courts have differed, emphasizing the futility of requiring an individual plaintiff to idly await the passing of 180 days when the EEOC, with a huge backlog of cases, could not as a practical matter process the charge within that time. *Bryant v. California Brewers Ass'n.*, 585 F.2d 421, 425 (9th Cir. 1978), *vacated on other grounds*, 444 U.S. 598 (1980). *See also Saulsbury v. Wismer & Becker, Inc.*, 644 F.2d 1251, 1257 (9th Cir. 1980). In *Milner v. National*

School of Health & Technology, 409 F.Supp. 1389, 1392 (E.D. Pa. 1976), the court held that since the EEOC had determined that conciliation was impossible, issuance of a right-to-sue letter 150 days after the Commission assumed jurisdiction did not preclude a suit in the district court.

Unlike those cases, the district court here ruled that the correctness of the EEOC's dismissal of administrative proceedings was immaterial. On that basis, the court rejected the defense's proffer challenging as unreasonable and unfounded the EEOC's determination that the plaintiff's charge could not be processed within the statutory period. Consequently, neither the defendant's challenge to the regulation nor the EEOC's support of it was considered.

It may well be that the 180-day exhaustion period is not jurisdictional. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Hart v. J.T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979); *cf. Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 361 (1977). Even so, premature resort to the district court should be discouraged as contrary to congressional intent. The preference for conciliation as the dispute resolution method in employment discrimination proceedings should not be undermined by a party's deliberate by-pass of administrative remedies. Accordingly, the plaintiff's actions in foreclosing EEOC conciliation efforts is one factor to be considered in determining whether equitable relief should be granted. *See Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 764 (3d Cir. 1971).

Because of our disposition of the case and the incomplete record on this issue at this time, we consider it inadvisable to rule on the validity of the regulation or the procedure followed here. Since the

case must be remanded to the district court in any event, further development of the factual background on this matter is in order. *See Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983).

II

We have consistently held that our review of the grant or denial of preliminary injunctions is limited to determining whether there has been an abuse of discretion, an error of law, or a clear mistake in the consideration of the proof. *Rennie v. Klein*, 653 F.2d 836, 840-41 (3d Cir. 1981), *vacated on other grounds*, 458 U.S. 1119 (1982); *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975). The moving party must, however, demonstrate that irreparable injury will occur unless relief maintaining the status quo is granted. *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351 (3d Cir. 1980). We are convinced that no such injury was shown in this case.

The district court stated that it did not accept "the rationale that any clear violation of one's civil rights constitutes irreparable harm." The court correctly declined to follow the position of the Court of Appeals for the Fifth Circuit in *Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir. 1981), that irreparable harm will be presumed when private sector employees seek a preliminary injunction in Title VII employment discrimination cases. That rule was developed in cases that antedated adoption of the 1972 amendments to the Act. *See, e.g., Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969).

We adopt the position set out in *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037 (6th Cir. 1981). There, the Court of Appeals for the Sixth Circuit upheld the necessity for a showing of irreparable injury as a

prerequisite for injunctive relief under Title VII. Section 706(f)(2) of the Act authorizes the EEOC to seek a preliminary injunction pursuant to Fed. R. Civ. P. 65 whenever the Commission concludes that prompt judicial action is necessary to carry out the purposes of the Act.

After a comprehensive review of the legislative history, the court observed the Senate had taken the position that no showing of irreparable injury would be required, citing *United States v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969). In conference, however, the Senate receded from its position. For its part, the House agreed that irreparable injury to the extent traditionally required in equity would be sufficient. After appraising this history, the Court of Appeals concluded that the traditional irreparable injury standard continued to be appropriate.

In *EEOC v. Pacific Press Publishing Ass'n.*, 535 F.2d 1182 (9th Cir. 1976), the Court of Appeals held that the standard of injury would be relaxed when the Commission itself seeks relief while administrative procedures continue. But the Court observed that in "sharp contrast" private parties "must show irreparable harm to them if the injunction did not issue." *Id.* at 1171.

We are not presented here with special circumstances requiring preservation of the status quo established under a court order, *e.g.*, *United States v. City of Philadelphia*, 573 F.2d 802 (3d Cir. 1978),[1] or

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1. In United States v. City of Philadelphia, we could not "say that the district court erred in presuming [that] irreparable injury would result if it failed to enter a preliminary injunction." 573 F.2d at 807. But in that instance, the United States moved to enjoin the defendant's imminent appointment of all males to a police officer training class because the hiring would violate a previously issued court order.

during the pendency of administrative action, *e.g.*, *EEOC v. Pacific Press Publishing Ass'n.*, 535 F.2d 1182 (9th Cir. 1976). *See Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942 (1st Cir. 1983). Consequently, we agree with the district court that in Title VII cases the plaintiff must establish irreparable injury as a prerequisite to the receipt of injunctive relief. *Accord*, *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980); *Ekanem v. Health & Hospital Corp.*, 589 F.2d 316 (7th Cir. 1978).

Plaintiff did not meet that burden in this case. The district court found the injury to be of a "peculiar nature" and that she was the subject of retaliation by the University. The record, however, does not support these findings. Plaintiff was on the evening shift for approximately two to three weeks. During that time her attendance at a Spanish class on Tuesday evenings was interrupted. The class also met on Thursdays, but that session coincided with the plaintiff's day off.

There is some suggestion on the record that Spanish classes were held at other hours when plaintiff could have attended despite the involuntary shift change. By the time the case came on for hearing, plaintiff may have missed two or perhaps three classes. But because of her more recent transfer to the night shift, she could attend instruction regularly.

The "retaliation" referred to by the trial judge seemingly had to do with the University's refusal to allow plaintiff to attend the Spanish classes during her work hours. The only other injury plaintiff mentioned was that her sleep habits were disturbed causing irritability that she vented on her family.

At most, the plaintiff's complaint describes an inconvenience easily compensable by damages. In *Fuller v. Highway Truck Drivers*, 288 F.Supp. 287 (E.D. Pa. 1964), *aff'd*, 428 F.2d 503 (3d Cir. 1970), the

plaintiffs complained of being subjected to less desirable work assignments requiring them to report for work earlier in the morning. The court determined that this inconvenience did not constitute irreparable harm and had "never been regarded as the type of damage immeasurable in dollars. Courts daily award damages for pain, suffering and far more serious inconveniences." *Id.* at 290. In *Oburn v. Shapp*, 521 F.2d 142, 151 (3d Cir. 1975), this court found that the loss of benefits derived from state employment was not irreparable. *See also Glasco v. Hills*, 588 F.2d 179, 181 (3d Cir. 1977) (irreparable means more than merely serious or substantial).

In *Sampson v. Murray*, 415 U.S. 61 (1974), a wrongful discharge case, the plaintiff alleged that her dismissal caused her to suffer a loss of income and damage to her reputation. The Court assumed the plaintiff could substantiate that harm but said, "we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction." *Id.* at 91-92. The court also observed that insufficient savings or difficulties in immediately obtaining other employment would not constitute irreparable injury. *Id.* at 92 n.68.

If a discharge from employment with all of its attendant difficulties is not irreparable injury, it is obvious that the involuntary transfer to another shift amounts to nothing more than inconvenience -- not enough to warrant the issuance of a preliminary injunction.

III

In addition to irreparable injury, the movant must demonstrate a reasonable probability of success on the merits. *Constructors Ass'n. of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir. 1978); *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975); *Delaware River Port*

Authority v. Transamerican Trailer Transportation, Inc., 501 F.2d 917 (3d Cir. 1974). The University's contention is that the district court in addressing this requirement erroneously excluded any evidence pertinent to the issue of the bona fide occupational qualification. Because the BFOQ defense was relevant, the district court erred in not considering it and evaluated the plaintiff's chances of ultimately prevailing under a mistaken view of the law.

Section 703(e) of Title VII, 42 U.S.C. 2000e-2(e), provides: "Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice . . . to hire or employ employees, [or] for a labor organization to classify its membership . . ., on the basis of . . . sex . . . where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise."

The district court recognized that the BFOQ applies in other than pure hiring situations and may exist within an organization so that "a person may be transferred out of that position or refused an opportunity to transfer into that position." However, the court determined that "[b]y no reading of the statute can one reasonably conclude that Congress decided to vitiate the seniority rights of those who meet the BFOQ requirement and allow others to retain seniority rights." The court found a distinction between "locking" a person into a position and excluding an individual from the same position. It is apparent the plaintiff's contention that her seniority rights were being violated prompted the district court to rule that the BFOQ defense was irrelevant to this case.

To avoid confusion, it is necessary to keep the concepts of BFOQ and seniority separate. At the outset, it must be understood that the BFOQ presupposes the

existence of gender discrimination but nevertheless explicitly takes it outside Title VII's prohibition. *See Dothard v. Rawlinson*, 433 U.S. 321, 332-33 (1977). The scope of the Title VII inquiry is limited to determining whether the discriminatory practice is not prohibited because the BFOQ operates to justify the disparate treatment.

If the discriminatory policy legitimated by a BFOQ defense abridges seniority rights, that deprivation of benefits poses a contractual dispute. *Tangren v. Wachenhut Services, Inc.*, 658 F.2d 705, 707 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). Although the case at hand presents both factors, a dispute about the existence of a BFOQ may exist in the absence of any seniority rights. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The University's policy of transferring women officers to fill vacancies designated for females only was challenged as discrimination violating Title VII. The policy admittedly discriminates on the basis of sex. But the BFOQ exception permits an employer to discriminatorily "employ" a person where the individual's sex is a qualification reasonably necessary to the normal operation of that business.

Operating under the BFOQ exception, an enterprise may legally exclude a person from a position either on the initial hiring or by transfer during the term of employment. *See, e.g., Fesel v. Masonic Home*, 447 F.Supp. 1346 (D. Del. 1978) (hiring), *aff'd*, 591 F.2d 1334 (3d Cir. 1979). *Brooks v. ACF Industries, Inc.*, 537 F.Supp. 1122 (S.D. W.Va. 1982) (transfer). Nor does anything in Title VII's language preclude a decision to retain an individual in a certain job because that person is a member of a sex possessing a special qualification required in the position. Transferring or refusing to transfer within an organization are both

encompassed within the meaning of "employ." The University's otherwise unlawful practice is permissible discrimination if a BFOQ exists -- that is the *raison d'etre* of the exception.

The University asserted that the requirement for a female officer existed because of the security concerns presented by the female students and the commitments made to meet their needs. In attempting to establish the BFOQ, evidence was proffered to show the special needs of rape victims, as well as the necessity to have a female officer quickly available to assist the victim and participate in the investigation. The particular sensitivity required in rape cases was asserted as justification for selecting female rather than male officers. This evidence, clearly relevant to whether the University could show a BFOQ, should have been admitted and considered.

The merits of the BFOQ defense must be resolved not only to determine whether the University violated Title VII but also whether the Union acted illegally in entering into the "DuPlantis Settlement." The plaintiff's seniority rights under the collective bargaining agreement are matters of contract and, in accordance with its terms, are to be determined by arbitration. The terms of a collective bargaining agreement may not violate Title VII. However, an employer may grant rights more generous than those provided by the statute. The lawfulness of the collective bargaining agreement under Title VII is determined by the court, but any dispute as to the contract's grant of seniority is to be determined by arbitration. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The record reflects that the union had begun a grievance procedure at the time the hearing was held in the district court. We do not know whether the process is complete or what the award specified. This is an additional matter for clarification in the district court.

In sum, the BFOQ defense, unlike the plaintiff's contractual seniority rights, was relevant to resolution of the Title VII claim. Although both issues arise from the same factual occurrence, they are nonetheless separate. *Id.* The district court erroneously ruled that the BFOQ defense was inapplicable and should have permitted the University to present evidence material to that defense.

We conclude that the district court erred in granting the preliminary injunction because plaintiff did not demonstrate irreparable harm and the court's finding of probability of success on the merits was erroneous.

Accordingly, the order of the district court will be vacated and the case will be remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1319

SANDRA MOTELES,

Appellee

v.

UNIVERSITY OF PENNSYLVANIA and
LOCAL 506, UNITED PLANT
GUARD WORKERS OF AMERICA,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, GIBBONS,
HUNTER, WEIS, GARTH and BECKER,
Circuit Judges,* and
DUMBAULD, *District Judge*.**

The petition for rehearing filed by the appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Joseph F. Weis, Jr.

Circuit Judge

DATED: April 25, 1984

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* Judges Aldisert, Adams, Higginbotham and Sloviter did not participate in the consideration of this matter.

** The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

STATEMENT SUR DENIAL OF REHEARING IN BANC

BECKER, *Circuit Judge*.

The University of Pennsylvania behaves with the best of intentions when it ministers to the special needs of rape victims and attempts to improve the security of its women students by insuring that women security guards are on duty at all times. I fear, however, that the worthiness of these goals may have enabled the University to fend off a determination of what appears to be a violation of Title VII. Specifically, I believe the panel opinion has too quickly accepted the proposition that, if womanhood is a bona fide occupational qualification for the job thrust upon Officer Moteles, that fact stands as a defense to her claim under Title VII that she was being denied the same job security rights based on seniority as her male counterparts. At least as I understand Title VII, although the bona fide occupational qualification (BFOQ) defense permits the employer to reserve a job for a woman, Title VII as a whole will not countenance the employer's decision to reserve a woman for a job, because in so doing, the employer discriminates beyond the instance where femaleness is necessary, and thus forfeits the protection of section 703(e).

As the foregoing suggests, contrary to the panel holding, I believe that the district court may well have been correct in holding that it was irrelevant whether being a woman was a BFOQ for the job assigned to Officer Moteles. A strong case can be made that, even if an employer would have a BFOQ defense in a suit brought by a man wishing to take a job that only women could perform, that fact would not allow the employer to grant job full security to men occupying gender-neutral jobs but to deny such job security to women. Instead, Title VII may well obligate the employer predicating job security on seniority and

faced with a vacancy in a "woman-only" job to hire a new women for such a job, even if this duty requires the employer to expand its workforce or, at worst, to dismiss "innocent" male employees elsewhere in its operation.[1]

A hypothetical posed by the attorneys for Officer Moteles in their petition for rehearing in banc helps expose the fundamental issues in this area -- issues that I do not believe the panel opinion has adequately addressed. They write:

> Imagine, for example, that a juvenile detention facility has two job openings: one for a recreation counselor, who deals with boys and girls; and the other, for the female BFOQ position of girl's dormitory counselor. Imagine further that one man and one woman apply for the recreation counselor job and that the female applicant is qualified while the male applicant is not.
>
> Of course, Title VII would not authorize that employer to reject the female applicant in favor of the male on the basis of her sex alone. Nor, by the same token, would the statute permit a defense that the man was hired in the hopes that the woman would consider taking the BFOQ job, when she had not applied for it. [*Sangstar v. United Air Lines, Inc.*, 438 F. Supp. 1221, 1229 (N.D. Cal. 1977)]. Yet the panel opinion would permit such a defense, justifying the discrimination against the

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1. *Cf.* W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers, 103 S. Ct. 2177 (1983) (upholding arbitration award requiring employer to compensate male employees for wages lost when they were laid off pursuant to a provision of a conciliation agreement signed with the EEOC under Title VII requiring employer to maintain its percentage of women employees in the event of layoffs).

> female applicant in the instance where she sought to be a recreation counselor, on the ground that some woman was needed to serve as a girl's dormitory counselor.

I am not certain whether the panel's opinion necessarily dictates the result suggested by Officer Moteles. First, the hypothesized woman's claim to the regular recreation counselor's job was based on "merit." Here, however, Officer Moteles' claim to the general security guard job (and against transfer to the less desirable "woman-only" security guard post) is based not on abstract "merit," but on seniority. Although the defendants here have recognized seniority as a substitute for merit in allocating employment status and privileges, sex-based employment decisions which are at variance with seniority rights may not be as inherently suspect under Title VII as those which are at variance with employment opportunities based on merit. Second, the hypothesized woman was denied employment altogether. Officer Moteles has been subjected to a somewhat lesser deprivation.[2] Nonetheless, I am hardly certain that these distinctions have much legal force and worry seriously that the panel opinion may wrongly dictate the result put forth by the petitioner for rehearing.

At the very least, I think the real issue in this case – which is whether, under the special circumstances present here, there is a "business necessity," *cf. Palmer v. General Mills, Inc.*, 513 F.2d 1040, 1044 (6th Cir. 1975), in maintaining a system where male security guards are granted greater protection against

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2. Whether Officer Moteles knew of her special vulnerability to transfer when she took the job with the University of Pennsylvania would not seem to be relevant. There is no "assumption of risk" defense recognized in Title VII.

transfer to undesirable shifts than women of equal experience – ought to be addressed by the full court.[3] I so state because I believe that this case meets the requirements of our Internal Operating Procedures Chapter 8.B. for in banc hearing. I believe that the case is inconsistent with the tenor of our prior pronouncements and those of the Supreme Court on Title VII, particularly on the seniority area. I also perceive this case to be of considerable importance. I make that judgment because I believe that, as the federal courts work their way through the "second generation" Title VII cases, i.e., those dealing not with mass discrimination but with the more technical aspects of the law, the BFOQ exception and the notion of business necessity will become increasingly important. I thus think that this case should be given in banc consideration so that the contours of these doctrines might be more fully and definitively explored,[4] hence I dissent from the denial of rehearing in banc.

Judge Gibbons joins in this statement.

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3. If it were to address this issue, the court could consider the Supreme Court's decision in Connecticut v. Teal, 102 S. Ct. 2525 (1983). There the Supreme Court rejected an argument that, if an overall employment policy advantages a minority group, distinct practices disadvantaging that group cannot be assailed under Title VII.

4. The contours of the business-necessity defense, hence of the evidence that might support it, has yet to be adequately explored in the caselaw.

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v.

UNIVERSITY OF PENNSYLVANIA and
LOCAL 506, UNITED PLANT
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Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 83-1301)

Present: HUNTER and WEIS, *Circuit Judges*,
and DUMBAULD, *District Judge*.*

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above case be amended as follows:

The word "preliminary" be inserted after the word "for" on the first line of the slip opinion on page 10, so that the line shall read, "prerequisite for preliminary injunctive relief under Title VII."

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* The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

The word "preliminary" be inserted on the seventh line following the word "of" on page 11, so that the line shall read, "prerequisite to the receipt of preliminary injunctive relief."

BY THE COURT,

Joseph F. Weis, Jr.

Circuit Judge

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